FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 344

O. V. KESSLER,
Petitioner,

v.

THOS. P. MCGLONE, SR., Executor, Fauquier National Bank, Administrator, C.T.A. of the Estate of Rose Meredith Kessler, Deceased; THOMAS F. MCGLONE, ROBERT MCGLONE, THOMAS F. MCGLONE, JR., MABEL MCGLONE, EDWARD B. MCGLONE, and AGNES J. KERR,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MARCUS BORCHARDT,
Counsel for Petitioner.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

The Petitioner for a Writ of Certiorari, respectfully represents to this Honorable Court as follows:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

On February 5, 1946, Rose Meredith Kessler, now deceased, and a bona fide resident of the State of Virginia,

proceeded to the State of Florida for the sole purpose of obtaining a divorce from O. V. Kessler, the petitioner herein. Thereafter, on May 10, 1946, the said Rose Meredith Kessler filed suit for divorce against her husband, the said O. V. Kessler, in Dade County, Florida, without serving notice of said suit on the petitioner at his last known address, and the said petitioner had no notice whatsoever of the filing of said suit, prior to the hearing of said cause.

On July 17, 1946, without the petitioner's participation in the proceedings, in any manner whatsoever, a final decree of absolute divorce was granted the said Rose Meredith Kessler in Dade County, Florida (R. 133), and three days thereafter the said Rose Meredith Kessler left Florida and returned to her home in Gainesville, Virginia.

Rose Meredith Kessler died on February 7, 1947.

Thereafter a suit was filed by the petitioner against the respondents herein in the Circuit Court of Prince William County, State of Virginia, to have by way of curtesy interest in the estate of the said deceased. A special plea was filed by the respondents alleging that the petitioner had no standing in the litigation, on the ground that on July 16, 1946, the said Rose Meredith Kessler had obtained a divorce from the petitioner in Dade County in the State of Florida.

Thereupon a replication was filed by the petitioner and the validity and operative effect of the Florida judgment, thus, was put in direct issue.

The Circuit Court of Prince William County upheld the validity and operative effect of the Florida decree for divorce and ruled adversely to the interest of the petitioner R. 97).

Thereupon your petitioner sought a review of said ruling in the Supreme Court of Appeals of Virginia at Richmond through appeal, and on June 15, 1948, an order was entered in the Supreme Court of Appeals of Virginia denying the application for a review of the ruling of the Circuit Court of Prince William County (R. 99).

B

STATEMENT AS TO JURISDICTION

This case is within the jurisdiction of this Court under Title 28, Sections 2101c and 1257 (3) of the U. S. C., the Supreme Court of Appeals being the court of highest jurisdiction in the State of Virginia. An order of this Court extending time to October 13, 1948, to file the present petition was entered on September 1, 1948 (R. 162).

The petitioner contends that denial of a review by the Supreme Court of Appeals of Virginia and affirmance of the judgment below of the matters herein involved was contrary to the law as expressed by this Honorable Court.

C

QUESTIONS PRESENTED

The questions presented here are:

1. Does the Full Faith and Credit Clause of the Constitution apply in a case where the petitioner has not had his "day in court", prior to the entry of a judgment in a divorce suit, and wherein the petitioner received no notice of the institution of the suit at his last known address, and thus was precluded from protecting his rights and interest.

2. Does the Full Faith and Credit Clause of the Constitution apply in a case where the petitioner has not participated in any manner whatsoever in divorce proceedings instituted in a foreign state, wherein participation was held to be a prerequisite to the validity of the decree, under the decisions of this Court.

D

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In denying the petitioner a review of the judgment of the Circuit Court of Prince William County wherein an invalid

Florida decree for divorce was upheld, and in failing to reverse the erroneous ruling of the lower court, the Supreme Court of Appeals of Virginia decided a question contrary to and not in accord with the applicable decisions of this Court.

The matter herein is of extreme importance, and the law applicable should be clarified so as to bring a uniformity in divorce decrees obtained in foreign states.

WHEREFORE, your petitioner respectfully prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

MARCUS BORCHARDT,
Counsel for Petitioner.

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Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

ORDER OF THE COURT BELOW

The order of the Supreme Court of Appeals of the State of Virginia which disposed of this case, is printed in the record (R. 99).

II

JURISDICTION

(1) The jurisdiction of this Court is invoked under Title 28, Sections 2101 c and 1257 (3) of the U. S. C. and an order of this Court extending the time to October 13, 1948, to file the present petition was entered on September 1, 1948 (R. 162). The specific claims as to the jurisdiction of this Court are set out in the foregoing petition under the heading "B" and are not repeated here.

(2) The judgment of the Supreme Court of Appeals of the State of Virginia sought to be reviewed was rendered June 15, 1948 (R. 99). This judgment affirms the judgment of the Circuit Court of Prince William County (R. 97).

III

STATEMENT OF CASE

The essential facts of the case are given under the heading of "A" in the foregoing petition and in the interest of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument which follows.

IV

SPECIFICATION OF ERRORS

It is respectfully submitted that the Supreme Court of Appeals of the State of Virginia erred:

1. In denying to your petitioner a review of the judgment of the Circuit Court of Prince William County.

2. In failing to reverse the judgment of the Circuit Court of Prince William County whereunder a divorce decree obtained in the State of Florida was erroneously held valid and operative.

3. In failing to reverse the judgment of the Circuit Court of Prince William County, on the ground that the petitioner

did not have his "day in court" in the matters involved herein.

4. In failing to reverse the judgment of the Circuit Court of Prince William County which erroneously considered the divorce decree obtained in the State of Florida as *res judicata* herein, although under the decisions of this Court, the Florida divorce decree is invalid and not operative herein.

V

ARGUMENT

(a) Summary of Argument

The chief points presented herein are as follows:

The petitioner has not had his "day in court" in the Florida proceedings as notice of the institution of the divorce proceedings in Florida was not served upon him at his last known address, and he therefore was not in a position to protect his rights and interests.

The Florida divorce proceedings are not *res judicata* herein and the Full Faith and Credit Clause of the Constitution therefore does not apply, as the petitioner did not submit himself to the jurisdiction of the Florida Court, and in no wise did he participate in the Florida divorce proceedings.

(b) Failure to Serve Petitioner With Notice of the Institution of the Florida Divorce Proceedings at His Last Known Address Denied Him His "Day in Court".

At the hearing in the Circuit Court of Prince William County it was developed that the petitioner was not served with a notice of the institution of the divorce proceedings in Florida (R. 73); that the petitioner resided at 5719 Third Street South, Arlington, Virginia, from January, 1946, to the date of the hearing, and that Rose Meredith Kessler had full knowledge of the petitioner's said perma-

nent address when she left Virginia for Florida; that the petitioner received letters from the said Rose Meredith Kessler at said address, postmarked Gainesville, Virginia, as late as January 17, 1946; January 19, 1946, and January 25, 1946 (R. 137, 138), and that she did not leave Virginia for Florida until February 5, 1946 (R. 78).

The record in this cause shows that paragraph 1 of the Bill of Complaint for Divorce filed in Florida by the late Rose Meredith Kessler (R. 102), falsely set forth that the defendant (the petitioner herein) "is a resident of Washington, District of Columbia", and further shows that the Order for Publication was enclosed in an envelope addressed to "Oliver V. Kessler, Washington, D. C.", with a notation (R. 111):

> "Not in Phone Directory
> Returned to Sender
> Unclaimed from Washington, D. C."

and that no attempt was made to contact him at his home in Virginia.

The said Rose Meredith Kessler had it within her power to see that proper notice of the institution of the Florida proceedings on May 10, 1946, was served upon her husband. However, she preferred perpetrating a fraud upon the petitioner and the Florida Court in this respect, in order to proceed in the simulated divorce proceedings without any opposition whatsoever.

In upholding the validity of the divorce decree, the Trial Court stated:

> "It is true that there might be some question raised—and it seems to me that that is about the only real question that can be raised, in view of the notice of the Court in this State—about the lack of notice given to Mr. Kessler insofar as disclosing his address, if she knew it. She made an affidavit to the effect that she did not know it." (R. 89)

97

When the Full Faith and Credit Clause of the Constitution was promulgated (Art. IV, Sec. 1) and the congressional legislation enacted thereunder, it was not intended that a judgment fraudulently obtained in one state should be honored and considered *res judicata* in another state, as most assuredly in such a case, the person against whom a judgment is rendered has not had his "day in court".

(c) The Fact That the Petitioner Did Not Enter a General Appearance in the Florida Divorce Proceedings, Nor Participate in Said Proceedings in Any Manner Whatsoever Precludes the Florida Judgment From Being Res Judicata in Another State and From Consideration Under the Full Faith and Credit Clause of the Constitution.

Although the fraud perpetrated upon the Florida Court and the petitioner, in the Florida divorce proceedings in the falsification as to service of notice as aforesaid, in itself, would be sufficient to preclude the recognition of the Florida divorce decree in the State of Virginia or in any other state—the fact that the petitioner did not enter his general appearance nor participate in the Florida proceedings in any manner whatsoever, brings the present case squarely within the applicable decisions that would deny its validity and operative effect in other jurisdictions.

In order to emphasize the error of the lower court in considering the Florida judgment as *res judicata*, specific attention is called to the fact that in the present case the petitioner did not enter a general appearance in the Florida divorce proceedings and in no wise participated in such proceedings prior to the entry of the Florida judgment.

In all of the cases wherein this Court has held the doctrine of *res judicata* as applicable in another state in divorce proceedings, under and by virtue of the Full Faith and Credit Clause of the Constitution, both principals in the divorce litigation appeared, were represented by counsel, offered testimony, and otherwise actively participated in such procedings.

In *Davis* v. *Davis*, 305 U. S. 32, decided in 1938, wherein an absolute divorce obtained in the State of Virginia was sustained, and the right to contest the domicile of the divorce in a supplemental proceeding was denied, the Court stated:

> "She may not say that she was entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicile, introduced evidence to show it false, took exceptions to the commissioner's report, and sought to have the court sustain them and uphold her plea."

The Court then stated, on page 43:

> "Considered in its entirety, the record shows that she submitted herself to the jurisdiction of the Virginia Court and is bound by its determination that it had jurisdiction of the subject matter and of the parties."

In *Stoll* v. *Gottlieb*, 304 U. S. 105, in commenting on the validity of a decree *where both parties have appeared and presented evidence*, the Court stated:

> "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

In two cases decided by this Honorable Court as recently as June 7, 1948, *Sherrer* v. *Sherrer*, 68 Sup. Ct. Rep. 1087, and *Coe* v. *Coe*, 68 Sup. Ct. Rep. 1094, it definitely was held that in divorce proceedings where both principals appeared and actively participated, the doctrine of *res judicata* must be applied under the Full Faith and Credit Clause, and such adjudications are not susceptible to collateral attack. Conversely, *RES JUDICATA* SHOULD NOT APPLY, NOR SHOULD THE FULL FAITH AND CREDIT

CLAUSE APPLY, WHERE THERE HAS BEEN NO PARTICIPATION IN THE ORIGINAL PROCEEDINGS BY THE PRINCIPALS INVOLVED.

In the case of *Sherrer* v. *Sherrer, supra,* the petitioner challenged the validity of a divorce decree obtained by the respondent from petitioner in Florida *in a contested divorce suit.* A judgment for the petitioner was affirmed by the Supreme Judicial Court of Massachusetts, and when the matter was brought before this Honorable Court through a Writ of Certiorari, the judgment of the Massachusetts Court was reversed. In reversing the judgment this Court pointed out that the Full Faith and Credit Clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent sovereign States into a nation, and if in its application local policy must at times be required to give way, the result is part of the price of our federal system; that full faith and credit must be given to divorce decrees rendered in "contested cases" by Courts in sister states no less than to other decrees.

The Court stated:

> "The respondent received notice by mail of the pendency of the divorce proceedings. He retained Florida counsel who entered a general appearance and filed an answer denying the allegations of petitioner's complaint, including the allegation as to petitioner's Florida residence.
>
> "On November 14, 1944, hearings were held in the divorce proceedings. Respondent appeared personally to testify with respect to a stipulation entered into by the parties relating to the custody of the children. Throughout the entire proceedings respondent was represented by counsel. Petitioner introduced evidence to establish her Florida residence and testified generally to the allegations of her complaint. Counsel for respondent failed to cross-examine or to introduce evidence in rebuttal.

> "The Florida court on November 29, 1944, entered a decree of divorce after specifically finding 'that petitioner is a bona fide resident of the State of Florida, and that this court has jurisdiction of the parties and the subject matter in said cause * * *' Respondent failed to challenge the decree by appeal to the Florida Supreme Court."

In discussing the Florida proceedings, the Court further stated (Sup. Ct. Rep. 1089):

> "The respondent personally appeared in the Florida proceedings. Through his attorney he filed pleading denying the substantial allegations of petitioner's complaint. It is not suggested that his rights to introduce evidence and otherwise to conduct his defense were in any degree impaired; nor is it suggested that there was not available to him the right to seek review of the decree by appeal to the Florida Supreme Court. It is clear that respondent was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicile. Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts. *Chicago Life Insurance Co.* v. *Cherry*, 1917, 244 U. S. 25, 37, S. Ct. 492, 61 L. Ed. 966; *Baldwin* v. *Iowa State Traveling Men's Association*, 1931, 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244."

Then, too, in the case of *Coe* v. *Coe, supra*, also decided on June 7, 1948, this Court stated:

> "Thus, here, as in the Sherrer case, the decree of divorce is one which was entered after proceedings in which there was participation by both plaintiff and defendant and in which both parties were given full opportunity to contest the jurisdictional issues."

It is again respectfully submitted, that it is of extreme importance to observe that in all of these cases, this Court

emphasized the fact that both the plaintiff and the defendant participated in the proceedings; conversely where there was not participation in the proceedings by both principals, it cannot be said that both of the parties has their "day in court".

In the present case, as herein repeatedly pointed out, the petitioner in no wise participated in the Florida proceedings. He did not enter a general appearance; nor did he file pleadings placing in issue the various matters he sought subsequently to contest in another court. He did not personally appear before the Florida Court, and give testimony; nor did he retain an attorney to represent him in said proceedings, all of which factors being of paramount importance in both of the leading cases—*Sherrer* v. *Sherrer* and *Coe* v. *Coe*.

VI

CONCLUSION

It is respectfully submitted that the action of the trial court in holding the Florida divorce decree to be valid and operative in Virginia—and the failure of the Supreme Court of Appeals of Virginia to review and reverse the judgment of said lower court, were erroneous, and in direct conflict with the law applicable herein, and that a Writ of Certiorari should be granted.

Respectfully submitted,

MARCUS BORCHARDT,
Counsel for Petitioner.

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Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The summary statement of facts in the Petition for Writ of Certiorari being incomplete in many important respects, the respondents restate such facts, with appropriate references to the record, as follows:

Rose Meredith Kessler, now deceased, left her residence in Virginia on February 5, A. D., 1946, and went to Flor-

ida for the purpose of permanent residence. The record in the Trial Court indicates, without contradiction, that she purchased a home (R. 147) and later purchased an adjoining lot to protect her home from a business encroachment (R. 152) and later died there on the 7th day of February, A. D., 1947.

On May 10, A. D., 1946, the said Rose Meredith Kessler filed suit for divorce against her husband, Oliver V. Kessler, in the Circuit Court of the Eleventh Judicial Circuit of Florida. The record indicates that Mrs. Kessler made a bona fide attempt to locate the Defendant, O. V. Kessler, at the time of filing suit (R. 79, 80, 81, 85, 86 and 87). Prior to and during the pendency of the suit, O. V. Kessler resided at a number of Hotels in Washington, D. C., moving about every few days because "they had reservations coming in and they put you out" (R. 73, 74, 75 and 66) and "hotel space is limited to three days, and I keep moving about every day" (R. 68). Whereupon, pursuant to Section 48.04 of the Code of Laws of the State of Florida (R. 158) Mrs. Kessler made her Affidavit to the effect, that after diligent search and inquiry, the residence of O. V. Kessler, as particularly as was known to her, was Washington, D. C. Substituted service by publication was then had in full compliance with the laws of Florida. (R. 104, 105, 106)

On July 17, A. D., 1946, the Circuit Court of the Eleventh Judicial Circuit of Florida entered a final decree of divorce in favor of *Rose M. Kessler vs. O. V. Kessler,* including among its findings, that it had jurisdiction of the parties and of the subject matter (R. 140).

On the 22nd day of July, A. D., 1947, O. V. Kessler filed suit in the Circuit Court of Prince William County, Virginia, against the personal representatives of Rose Meredith Kessler, deceased, and the heirs and legatees of the said decedent, praying that the order of probate of the

will of the decedent be set aside and that the decedent be declared intestate and that Complainant's interest, as the surviving consort of the said decedent "may be established" (R. 11). Whereupon, a special plea was filed by the Respondents alleging that the said Complainant was not the surviving consort of the said Rose Meredith Kessler because of the Order of the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County. Whereupon, the Complainant, O. V. Kessler, filed a replication alleging that "the late Rose V. (sic) Kessler was not divorced from the Complainant, but that at the time of her death said Complainant and said Rose Meredith Kessler were lawfully and legally husband and wife; that the said Rose Meredith Kessler "was not a resident of the State of Florida" (R. 14). The replication concerned the question of residence of Rose Meredith Kessler alone and did not concern the question of process on O. V. Kessler in the Florida divorce suit. The Circuit Court of Prince William County held that "the divorce is valid" (R. 97).

Thereafter, the Court, by its Order entered on the 20th day of January, A. D. 1948, decreed that the special plea filed by the defendant personal representatives, heirs and legatees "is hereby sustained and the decree of final divorce entered by the Circuit Court in and for the County of Dade, Florida, on the 17th day of July, A. D., 1946, is entitled to full faith and credit in this Court". (R. 17)

O. V. Kessler petitioned the Supreme Court of Appeals of Virginia for an appeal from the order of the Trial Court and, on the 15th day of June, A. D., 1948, the Supreme Court of Appeals of Virginia denied the appeal stating that the petition "having been maturely considered and the transcript of the record of the decree aforesaid seen and inspected, the Court being of the opinion that the said decree is plainly right, doth reject said petition and refuse said appeal. . . ." (R. 99).

2.

ARGUMENT

It is the contention of the Respondents herein that no Federal question is presented to this honorable Court by the petition filed in this cause.

Petitioner lays the jurisdiction of this Court as being under Section 1257 (3) of the Federal Judicial Code effective September 1, A. D., 1948, which concerns cases where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States. Notwithstanding, nowhere in the petition is it alleged that the validity of any state statute has been drawn in question in this case nor is it anywhere stated that any such statute is repugnant to the Constitution, Treaties or Laws of the United States.

The Petitioner contends, on page 2 of the Petition, that the validity and operative effect of the Florida judgment was put in issue by a replication which was filed in the Circuit Court of Prince William County, Virginia, by the Petitioner.

The record conclusively indicates, however, that the only issue presented in the Trial Court was that the decedent was not domiciled in the State of Florida at the time she obtained the divorce and also that the Petitioner received no notice of the pendency of the litigation in Florida. This presented to the Trial Court a clearcut issue of fact as to the jurisdiction of the Florida Court. Testimony was produced by both sides covering this particular issue and the finding of the Trial Court was that the decedent was domiciled in and a resident of the State of Florida at the time that she obtained the divorce and that proper service was had upon the Petitioner under the Florida statute.

The Petitioner in the Trial Court raised no Federal question nor was any Federal question raised in his peti-

tion for a writ of error to the Supreme Court of Appeals of Virginia. The sole exception appearing in the record of the Trial Court is the general exception to the ruling made by the Court in its final order dismissing the cause (R. 15). Upon this sole exception, the Petitioner presented his petition for an appeal to the Supreme Court of Appeals of Virginia which, by its order refusing to grant the appeal, held that the decedent was "plainly right" (R. 99).

The Respondents rely on the case of *Honeyman v. Haney*, 300 U. S. p. 18, wherein this Court held "before we may undertake to review a decision of the Court of a state it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest Court of the State having jurisdiction but, that its decision of the Federal question was necessary to the determination of the cause".

Not only was no Federal question ever presented to the Supreme Court of Appeals of Virginia, or, in fact, to the Trial Court, but, further, the Petitioner in his specifications of error filed with his brief before this honorable Court relies only upon the allegations that the Petitioner did not "have his day in Court". His other specifications resolve themselves with general allegations that the Supreme Court of Appeals of Virginia erred in refusing to grant the appeal. The question of whether or not a party litigant has "his day in Court" is not by any means a Federal question but is one to be determined fully by the Court of the state jurisdiction in which the matter is presented. The Florida Court, the Virginia Trial Court and the Supreme Court of Appeals of Virginia all held in the affirmative that the Petitioner did have his day in Court.

The appearance of a litigant is not necessary in any proceeding where substitute service has been had under the Laws of the State, in order that a final judgment may be had in that proceeding.

Petitioner relies on the companion cases of *Sherrer v. Sherrer*, 68 Sup. Ct. Rep. 1087, and *Coe v. Coe*, 68 Sup. Ct. Rep. 1094, and argues that, since these cases held that full faith and credit must be granted in divorce proceedings where both parties appeared in the Trial Court, conversely full faith and credit should not be granted where there has been no participation in the original proceedings by the persons involved. The Sherrer and Coe cases involve the question of full faith and credit being given to the decision of a sister state and which the Courts of Massachusetts failed to give. In the instant case no such question is involved and the Trial Court in the instant case, upon the plea of the Petitioner, made a judicial re-examination of the jurisdictional questions involved in the obtaining of the Florida divorce. The Trial Court held that the Florida Court had jurisdiction. However, the Sherrer and Coe cases can not be argued conversely since they are under a different classification of cases which are described in Section 237 of the Judicial Code. The Sherrer and Coe cases concern questions where the decision is against the validity of a state statute and cannot be argued conversely where a case is sought to be reviewed in this Court as being repugnant to the Constitution.

3.

CONCLUSION

It is respectfully submitted that the only question concerned in the Petition is one of fact as to whether or not the Petitioner had "his day in Court", a matter decided by the Courts below, that no Federal question is involved and that the Writ of Certiorari should be denied.

Respectfully submitted,

JOHN A. K. DONOVAN
JOHN G. TURNBULL
CORNELIUS H. DOHERTY
Counsel for all Respondents.

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Respondents

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

The petitioner for a rehearing of the petition for writ of certiorari respectfully represents to this Honorable Court as follows:

GENERAL

On November 8, 1948, the petition for writ of certiorari herein was denied. The facts, of course, will not be restated except for the purpose of clarifying certain of the questions involved.

A suit was filed by the petitioner in the Circuit Court of Prince William County, State of Virginia, against the personal representatives of Rose Meredith Kessler, who died shortly after a decree for divorce was entered in her behalf in the State of Florida, the Virginia suit having been filed by the petitioner as the husband of the said Rose Meredith Kessler (R. 10).

A special plea was filed by the respondents (R. 12), alleging that the petitioner had no standing in the litigation by reason of the decree for divorce entered against him on July 16, 1946, in Dade County, State of Florida—and a replication thereupon was filed by the petitioner (R. 14), which specifically set forth "that the alleged divorce was void and of no effect in the State of Virginia", thereby raising a federal question.

In the brief filed by the respondents in opposition to writ of certiorari, counsel for respondents allege that the petitioner lays jurisdiction of this Court only under Section 1257 (3) of the Federal Judicial Code, whereas the jurisdiction is invoked under Title 28, Section 2101c of the U. S. C. (formerly Title 28, U.S.C.A., Section 344 (b)), as set forth in the original petition; and counsel for respondents further allege that no federal question is presented by the petition filed in this cause.

Of course, this Honorable Court does have jurisdiction, as not only is a federal question presented, but consideration of public policy forbids the recognition of the fraudulent affidavit by Rose Meredith Kessler, now deceased, that was filed in the divorce proceedings in Florida, in order that proper recognition be given to service by publication in said proceedings,—and the state court recognized this affidavit notwithstanding the fraud.

JURISDICTION

With respect to the matter of a "federal question", counsel for respondents stated at the hearing in the Virginia

Court, which was predicated upon the pleadings, that the question before the Court was whether the Florida divorce decree was "entitled specifically to full faith and credit in this (Virginia) Court" (R. 19) under the Full Faith and Credit Clause of the Constitution (Art. IV, Sec. 1). As stated in the original brief filed herein, the questions for adjudication were (1) whether the Full Faith and Credit Clause of the Constitution should apply to a Florida divorce decree where the petitioner not only had no notice at his last known address of the institution of the suit in the State of Florida, but where a fraudulent affidavit was filed in order to give validity to service by publication, and (2) whether the Full Faith and Credit Clause should apply in divorce proceedings where there was no participation whatsoever by one of the litigants, which condition, under the decisions of this Court, was held to be a prerequisite to the validity of the decree.

In support of the position of the petitioner in opposing the validity of the decree, the petitioner incorporated in the Transcript of Record, filed herein, the entire Florida divorce proceedings (R. 101-161), which definitely show both lack of proper legal notice to the petitioner of the institution of the divorce suit in Florida, and lack of participation in any manner whatsoever by the petitioner, in the said Florida divorce proceedings.

The position of the petitioner, with respect to the "federal question", is specifically upheld in the following cases decided by this Honorable Court:

In the case of *Medberry et al* v. *State of Ohio,* 24 Howard (65) 413, it was held that the federal question *may be ascertained from the pleadings.*

In the case of *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113, it was held that whether a point was raised in the state court was itself a federal question and to determine the matter the United States Supreme Court was bound to examine the entire record.

In the case of *Hammond* v. *Whittredge,* 204 U. S. 538, it was held that the jurisdiction of the United States Supreme Court may be invoked where the defendant claimed rights under a federal statute, and that statute was referred to in and was an element of the decision of the state court.

In the case of *U. S.* v. *Bank of N. Y. and T. Co.,* 296 U. S. 463, it was held that a state decision contrary to federal law may be reviewed.

And in the case of *Honeyman* v. *Hanan,* 300 U. S. 14, cited in the brief of respondents filed herein, it was held that whether the record of a state court shows that a federal question was presented and necessarily determined, is of itself a federal question.

In the decision of the trial court (R. 97), it was specifically held that "this court (Virginia Court) would have to recognize that divorce (Florida divorce)" under and by reason of the Full Faith and Credit Clause of the Constitution.

FRAUDULENT AFFIDAVIT OF ROSE MEREDITH KESSLER

With respect to the affidavit of the late Rose Meredith Kessler (R. 104) to the effect that "after diligent search and inquiry, the residence of the defendant as particularly as is known to the affiant is Washington, D. C.", which was filed pursuant to the requirement of the Florida statute (R. 158), and which was a fraudulent affidavit, and *for reasons of public policy its consideration and recognition is forbidden.* It was so held in the case of *Hellmuth* v. *Hellmuth,* 69 Appeals D. C. 64, wherein service in a divorce case was obtained by publication instead of attempting to secure actual service upon the opposing litigant, and the Court stated, "It is quite proper to recognize the decree as a matter of comity *unless* consideration of public policy forbids such recognition." The ruling in this case was sub-

sequently upheld by this Court (305 U. S. 597 and 305 U. S. 673).

Certainly the fraud perpetrated by the late Rose Meredith Kessler in falsifying the affidavit by stating "that after diligent search and inquiry, the residence of the petitioner as particularly as is known to the affiant (Rose Meredith Kessler) is Washington, D. C.", is sufficient from a standpoint of public policy to forbid its recognition.

The Trial Court (R. 98) referred to the three letters that were written by Rose Meredith Kessler to the petitioner at his home at 5719 Third Street South, Arlington, Virginia, just before the said Rose Meredith Kessler left Virginia for the State of Florida for the purpose of instituting divorce proceedings, the letter of January 25, 1946 (R. 137-138) having been written just ten days before her departure for Florida on February 5, 1946 (R. 78)—and stated "It is true that Mrs. Kessler wrote certain letters to the address in Arlington County; but it is not in evidence at all that she knew whether they were ever received or not. There certainly is no acknowledgment of those letters having been received."

The petitioner himself testified (R. 73) that they were received by him "at 5719 Third Street South, and they are in Mrs. Kessler's handwriting and from her box No. 2 in Gainesville". Certainly this is conclusive evidence that the petitioner actually received these letters and shows beyond any question of a doubt that the affidavit in support of her notice by publication was conceived of fraud and nothing else, and this fact in itself would justify this Honorable Court in granting certiorari in the present matter.

CONCLUSION

It is therefore respectfully submitted that a "federal question" is definitely involved herein, giving this Honor-

able Court jurisdiction; that the fraudulent affidavit filed by Rose Meredith Kessler, deceased, in support of service on the petitioner by publication in the Florida proceedings is of no effect and in itself should nullify said proceedings; and the further fact that the cases of *Sherrer* v. *Sherrer* (Sup. Ct. Rep. 1097) and *Coe* v. *Coe* (68 Sup. Ct. Rep. 1094) were decided on June 7, 1948, substantially at the time of the ruling of the Virginia Court herein, wholeheartedly supports the present petition for a rehearing of the petition for writ of certiorari herein.

It is further respectfully submitted that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds above specified.

Respectfully submitted,

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